1 should actually be.

2   JUDGE SIPPEL: All right. Do you

3 have any general knowledge from all your years

4 in the industry, though? What is taken into

5 consideration for a licensing fee? You say

6 demographics is one.

7   THE WITNESS: Demographics is one.

8   JUDGE SIPPEL: Ratings, Nielsen

9 ratings, would be another one?

10   THE WITNESS: No.

11   JUDGE SIPPEL: I mean, I know you

12 said it was lesser, but is it a factor at all?

13   THE WITNESS: Not a -- looking at

14 the data, it is not a factor at all, because

15 the highest-rated networks don't have the

16 highest license fees or the converse. So I

17 think -- I think what's important, in terms of

18 determining what the license fee should be,

19 are some of the things I listed.

20   Is the content exclusive? Is it

21 unique? In this case, do they have a lot of

22 live games? Does it serve an underserved

1 niche? Is it programming that goes throughout

2 the year? I think those are the kinds of

3 things that cable operators look at when they

4 evaluate a cable network.

5   JUDGE SIPPEL: Thank you.

6   Cross examination now?

7   MR. SCHMIDT: Thank you, Your

8 Honor. I will be taking the lead on that.

9   CROSS EXAMINATION

10   BY MR. SCHMIDT:

11   Q   Mr. Gerbrant, it is good to see

12 you again. We met a couple of weeks ago. Do

13 you remember?

14   A   I do.

15   Q   Okay. I would like to pick up on

16 where you left off, which is the price for

17 networks. Do you agree with me that sports

18 networks tend to be more expensive than other

19 types of networks? They are among the more

20 expensive types of networks?

21   A   Actually, when I have looked at

22 the data, they are all over -- you have low-

1 priced networks, and you do have high-priced

2 sports networks.

3   Q   Like ESPN.

4   A   Yes.

5   Q   How much is ESPN?

6   A   It is going up every year. The

7 latest data -- some of the data I looked at,

8 it was over $3 per subscriber per month.

9   Q   Over $3. Do you remember Mr.

10 Orszag yesterday saying it was through the

11 roof, up to the second floor? Do you remember

12 that testimony?

13   A   I do remember -- I listened to his

14 testimony, yes.

15   Q   Okay. And you don't think ESPN is

16 overpriced, do you? Have you done that

17 analysis?

18   A   I have not done that analysis. I

19 do know that cable operators view it as very

20 high priced and with considerable concern.

21   Q   They all carry it, right?

22   A   They do. Absolutely.

1   Q   They all carry a pretty broad

2 tier, right?

3   A   Yes.

4   Q   Very broadly carried, right?

5   A   Yes, it is.

6   Q   Because it, as sports programming,

7 has unique value, right?

8   A   I think the brand name has some

9 unique value. It is -- it is maybe one of the

10 most recognizable brand names out there.

11   JUDGE SIPPEL: What brand name are

12 you talking about, ESPN?

13   THE WITNESS: ESPN.

14   JUDGE SIPPEL: What does that

15 stand for, ESPN?

16   THE WITNESS: I may be one of the

17 few people in the room who actually remembers

18 what it was originally named. This dates back

19 to the early '80s.

20   JUDGE SIPPEL: Wow.

21   THE WITNESS: It stands -- it

22 originally stood for Entertainment Sports --

1 and Sports Programming Network. They weren't

2 quite what they were going to do back then, so

3 they threw in "entertainment."

4   BY MR. SCHMIDT:

5   Q   What is the biggest brand name

6 among professional sports leagues? You just

7 said ESPN is a big brand name, right?

8   A   Correct.

9   Q   What is the biggest brand name

10 among professional sports networks? Do you

11 know the answer?

12   A   I think that is ESPN.

13   Q   I'm sorry. I misasked the

14 question. What is the biggest sports brand

15 name among sports leagues?

16   A   NFL, I will grant you NFL, NASCAR

17 is certainly --

18   Q   You wouldn't say NASCAR

19 outperforms NFL, would you?

20   A   On what metric? Certainly not on

21 TV ratings, no.

22   Q   Okay. Fan base? Revenue

1 associated with it?

2   A   I haven't looked at the latest

3 numbers, but I -- I believe the -- in terms of

4 revenue. But in terms of fan base it is

5 probably NFL.

6   Q   Okay. In fact, let's take a look

7 -- are you aware of the ESPN sports poll?

8   A   Yes, I -- well --

9   JUDGE SIPPEL: I'm sorry. What

10 sports poll?

11   MR. SCHMIDT: ESPN.

12   JUDGE SIPPEL: ESPN.

13   MR. SCHMIDT: The very channel we

14 were just talking about.

15   JUDGE SIPPEL: Okay.

16   BY MR. SCHMIDT:

17   Q   Are you aware of that?

18   A   Yes.

19   Q   Have you ever had a chance to

20 study it?

21   A   I have not. But I know it was

22 introduced into evidence in this case sometime

1 in the last couple of days.

2   Q   And had you seen it before then?

3   A   I had not.

4   Q   You never looked at the ESPN

5 sports poll?

6   A   I never looked at what was

7 introduced into evidence.

8   Q   Okay. Have you ever looked at it

9 other than that?

10   A   Yes. I have seen results of ESPN

11 sports poll reported in the industry press

12 over the years.

13   Q   Have you ever looked at the sports

14 poll itself?

15   A   Do you mean the one that is on

16 their website?

17   Q   Yes.

18   A   Yes. Yes, I have, actually.

19   Q   You understand it to be an

20 industry standard opinion poll, right?

21   A   Well, I am not sure I would call

22 it "industry standard." It is a self-selected

1 poll in the sense that it is only to the

2 people who visit the ESPN site.

3   Q   The biggest brand in sports, you

4 said, right?

5   A   Correct. But --

6   Q   Okay. Let me show you --

7   A   -- you go there if you are a

8 sports fan. If you are not a sports fan, you

9 are not -- you are unlikely to go to the ESPN

10 site. So, in that sense, someone who has some

11 polling experience, it is a self-selected

12 subset.

13   Q   Okay. Well, we are talking sports

14 networks in this case, right?

15   A   In this case we are.

16   Q   It appealed to sports fan, right?

17   A   Correct.

18   Q   Okay. And no reason to think Golf

19 fans and Versus fans don't go to ESPN, do you?

20   A   I have no reason to believe one

21 way or the other.

22   MR. SCHMIDT: Okay. Your Honor,

1 may I approach?

2   JUDGE SIPPEL: Please.

3   BY MR. SCHMIDT:

4   Q   This is Enterprise's Exhibit 177,

5 which is already in evidence.

6   A   Thank you.

7   Q   Mr. Gerbrant, I will ask you if

8 this is a copy of the ESPN sports poll?

9   (Pause.)

10   A   Do you have --

11   Q   Do you need my question again? Is

12 this a copy of the ESPN sports poll?

13   A   It appears to be a copy of ESPN

14 sports poll results, not the poll itself.

15   Q   Okay. Do you see where it says

16 "favorite spectator sport" in the upper left

17 corner?

18   A   Yes.

19   Q   What for 2007 is listed as the

20 favorite spectator sport at 23.7 percent?

21   A   Football.

22   Q   What is the percentage for ice

1 hockey?

2   A   2.6 percent.

3   Q   What is the most popular

4 programming on Versus, in your view?

5   A   Well, I think there are two, and

6 you have to look at them slightly different.

7 I believe the NHL playoffs are one. On the

8 other hand, they also carry the Tour de

9 France, which is -- it is a pretty grueling

10 two-week event. So, you know, the -- I would

11 say those are the two most popular.

12   Q   Okay. And we have already said

13 hockey is 2.6 percent of people's favorite

14 sport?

15   A   Correct.

16   Q   And if you flip to -- you have to

17 go all the way down to the second page, a

18 third of the way down. Do you see bicycling

19 and cycling?

20   A   Yes.

21   Q   And that is .2 percent, right?

22   A   Correct.

1   Q   If you add those up, you are still

2 not to three percent, right?

3   A   Okay.

4   Q   Correct?

5   A   Your math is actually improving.

6   Q   Do you see where golf is listed?

7   A   Let's see here. Are you talking

8 about golf unspecified?

9   Q   Yes.

10   A   Yes.

11   Q   No. Golf, men's pro.

12   A   Oh, I see. Okay. I --

13   Q   It is 1.1 percent, right?

14   A   Yes.

15   Q   And then, if you add in -- and I

16 don't want to do any more math, because I'm

17 not good at it -- you tell me what the math is

18 for golf pro plus golf unspecified.

19   A   I think that works out to two

20 percent.

21   Q   Two percent. So if you add up

22 hockey, bicycling, and the two types of golf,

1 what do you get?

2   A   What was the number you came up

3 with earlier?

4   Q   I am not doing any more math.

5   (Laughter.)

6   A   Let's see, it was two -- let's

7 see. Ice hockey was 2.6, and I -- you come up

8 with a little bit less than five percent. Is

9 that right?

10   Q   Okay. And that is about a fifth

11 to a quarter of people who list the NFL,

12 right?

13   A   Okay. I will buy that.

14   Q   Now, do you see the sixth page of

15 this document?

16   A   Let's see, there is two sides.

17 Okay. I have got it. I see the number.

18   Q   Do you understand what this data

19 represents?

20   A   Let me take a look at it.

21   (Pause.)

22   Okay. I have a -- without

1 studying it in detail, I have a general sense

2 of what it does.

3   Q   What does it do?

4   A   Well, this asks respondents to

5 rank their interest in the NFL based on what

6 looks like a four-point scale.

7   Q   And if you look at the

8 respondents, what is the pool of respondents,

9 do you know?

10   A   It doesn't say.

11   Q   Do you know?

12   A   I do not.

13   Q   Okay.

14   A   I do know they are self-selected,

15 so that --

16   Q   If you look at the respondents who

17 express some interest in the National Football

18 League, what is that percentage? What is the

19 total percentage of respondents who expressed

20 some level of interest in the National

21 Football League?

22   A   For which year?

1   Q   Well, you can pick any year, but

2 why don't we try 2007. I am not asking if

3 there are some decimal places in there. I am

4 not talking about the decimal places.

5   A   All right.

6   Q   I will take a rough estimate.

7   A   I will do some round up. It is 71

8 percent.

9   Q   Seventy-one percent. Do you know

10 how many Americans there are who are adults?

11   A   I know exactly where to go to get

12 that number. We have -- the U.S. population

13 is about -- a little over 300 million.

14 Sitting here, I can't quite recall how many of

15 those are age 18-plus, which I think is the

16 definition of an "adult."

17   Q   Can we say about 200, 230 million?

18 I looked it up and it was upwards of 230

19 million. But why don't we say 200 million, be

20 conservative?

21   A   Sure.

22   Q   Does that seem about right, at a

1 minimum?

2   A   Yes, sure. I can't quarrel with

3 that number.

4   Q   And if you take 70 percent of 200

5 million, how many adult Americans is that with

6 some interest in National Football League?

7 Just roughly.

8   A   That is where I have some serious

9 -- that is where I have some serious

10 reservations about doing that math.

11   Q   I am asking you the question.

12   A   That is a totally unfair thing to

13 do, because this is a self-selected -- you

14 can't -- I know a little bit about survey

15 methodology. You can't take that number that

16 was -- a) it was self-selected -- it is not a

17 -- you are mixing apples and orange data

18 forms. And I am not -- I don't want to be

19 argumentative, but --

20   Q   Well, you are arguing with me. I

21 asked you a simple question.

22   A   I am trying not to. I am trying

1 to actually help you understand why you can't

2 --

3   Q   I am trying to ask you a simple

4 question, Mr. Gerbrant. Can you tell me, out

5 of 200 million American adults, what 70

6 percent of that number is?

7   JUDGE SIPPEL: I guess he just

8 wants you to do the math for him.

9   THE WITNESS: Sure, I can do the

10 math. That would be about 140 million.

11   BY MR. SCHMIDT:

12   Q   One hundred forty million. So if

13 the analysis is valid -- and I understand you

14 want to say something about that, we can come

15 back to that, or Mr. Toscano can ask you about

16 that -- that is 140 million on a conservative

17 estimate of American adults with some interest

18 in the National Football League. Yes or no.

19   A   Fundamentally disagree with the

20 math. I can't -- I can't say that that is

21 what that represents. I'm sorry.

22   Q   But if the math works, that is the

1 number you come up with, 140 million, right?

2   A   Well, it --

3   Q   Yes or no.

4   A   We are not arguing about the math.

5   Q   So that is what I am asking.

6   A   We are arguing --

7   JUDGE SIPPEL: He has already

8 answered that question.

9   MR. SCHMIDT: Okay.

10   JUDGE SIPPEL: All right?

11 Probably over your objection, but he did the

12 math.

13   Go ahead.

14   MR. TOSCANO: My concern is the

15 repeated interruptions by Mr. Schmidt of the

16 witness' answers.

17   MR. SCHMIDT: My concern is the

18 witness answering questions I am asking.

19   JUDGE SIPPEL: This witness hasn't

20 been doing so bad. I mean, I have seen some

21 pretty -- you are doing fine, but give him a

22 chance to finish. If it turns out that you

1 are not getting what you are entitled to get,

2 you let me know, and I will correct that

3 situation.

4   MR. SCHMIDT: Thank you, Your

5 Honor.

6   JUDGE SIPPEL: But so far you are

7 getting it.

8   MR. SCHMIDT: Thank you.

9   BY MR. SCHMIDT:

10   Q   How many people watch the

11 Superbowl every year?

12   JUDGE SIPPEL: Well, before you

13 leave these -- just a minute. Before you

14 leave this thing that you just did here, this

15 calculation, my page 6 only shows through

16 2005.

17   MR. SCHMIDT: It carries over

18 through --

19   JUDGE SIPPEL: It carries over?

20 Oh, it goes to the next page.

21   MR. SCHMIDT: That is what we are

22 looking at, Your Honor.

1   JUDGE SIPPEL: So is that page 6

2 or page 7?

3   MR. SCHMIDT: Page 7.

4   THE WITNESS: Your Honor, the way

5 you have to look at it is --

6   JUDGE SIPPEL: Oh, I see.

7   THE WITNESS: -- like this.

8   JUDGE SIPPEL: I have got it. So

9 it is an unnumbered page. No, it says page 7.

10   THE WITNESS: I just took the --

11   JUDGE SIPPEL: So it is pages 6

12 and 7. Well, the record has to show it

13 accurately. So it is pages 6 and 7 that you

14 were testifying to. And the last column was,

15 okay, year 2007, and it shows -- I am going to

16 really give myself away on this one.

17   But the number that are somewhat

18 interested, that is the line I am trying to

19 follow, which is the second line, and it shows

20 34.8 percent.

21   THE WITNESS: Actually --

22   JUDGE SIPPEL: Well, that is

1 female I guess.

2   THE WITNESS: No. No. Your

3 Honor, what he is referring to is this bottom

4 line here.

5   JUDGE SIPPEL: Oh, yes, I see it.

6   THE WITNESS: All the way over.

7   JUDGE SIPPEL: And what does that

8 mean? I mean, where does this come out on the

9 other side where they've got the actual

10 categories?

11   THE WITNESS: Well, what it says

12 -- what it refers to is it is a summation of

13 anybody who is a little bit interested,

14 somewhat interested, or very interested. So

15 even if you are a little bit interested it got

16 counted into the 70 percent.

17   JUDGE SIPPEL: All right. So --

18 all right. I guess you are going to have to

19 rerun those numbers now that John Madden is --

20   (Laughter.)

21   He is the only one that can

22 explain the game.

1   Go ahead.

2   BY MR. SCHMIDT:

3   Q   What is the number, just so we

4 have it for the record, that are very

5 interested?

6   A   That are very interested?

7   Q   Yes.

8   A   Is 34.8 percent.

9   Q   How many Americans watch the

10 Superbowl every year?

11   A   Okay. The rating is consistently

12 somewhere in the -- I am going to try to do

13 the math on the fly here. It is usually -- it

14 has been 40 percent, or 40 rating and above,

15 against a universe of -- the last one was I

16 think 114 million households. So 40 percent

17 of that -- what is that?

18   Q   Sixty-some --

19   A   No. That would be -- it wouldn't

20 quite be 50 million. That would be -- 40

21 percent of 114 million households would be

22 about 46 million households. And then, you

1 have average viewers per viewing household, a

2 little bit under three. So it would be

3 something north of 125 million I guess, just

4 doing the math.

5   Q   How many people watched the final

6 game of the Stanley Cup Finals?

7   JUDGE SIPPEL: What was that

8 question?

9   MR. SCHMIDT: How many people

10 watched the final game of the Stanley Cup

11 Finals?

12   JUDGE SIPPEL: Oh, thank you.

13   THE WITNESS: I know you are a big

14 hockey fan. I actually don't know what the

15 rating -- I don't have in my head what the

16 rating was for the Stanley Cup Finals, so I

17 can't do the equivalent math.

18   BY MR. SCHMIDT:

19   Q   Does it come anywhere close to the

20 number you just gave us?

21   A   No, I don't think so.

22   Q   Let me show you another ratings

1 data -- before I do, let me just ask you a

2 question about ratings. Do ratings matter at

3 all?

4   A   Certainly if you are -- ratings

5 matter, are very important if you are selling

6 advertising.

7   Q   Advertisers care a great deal

8 about ratings, right?

9   A   So do networks, yes.

10   Q   So do networks.

11   A   For that purpose. I mean, if you

12 selling -- if you are an ad-supported network,

13 you care about ratings, because that is what

14 advertisers care about.

15   Q   Is it your testimony that ratings

16 make no difference whatsoever to cable

17 companies, they don't care how high the

18 programs they run are rated?

19   A   I didn't say they didn't care

20 about ratings.

21   JUDGE SIPPEL: I heard his

22 testimony -- I want to be sure that I am not

1 getting confused here that -- he testified

2 that when it came to determining a licensing

3 fee, or a -- that the ratings were de minimis.

4 That is what I understood.

5   MR. SCHMIDT: That is what I

6 understood, too. That is why I am asking this

7 question, Your Honor.

8   JUDGE SIPPEL: Oh, okay. Well, in

9 that context you understood that.

10   MR. SCHMIDT: Yes.

11   JUDGE SIPPEL: Okay. I think you

12 misquoted him, though, in terms of what his

13 testimony was. Well, that doesn't make any

14 difference. Go ahead. Ask the question.

15   BY MR. SCHMIDT:

16   Q   Do you think they don't matter at

17 all?

18   A   No, that is not what I said at

19 all.

20   Q   Do they make a difference to cable

21 companies?

22   A   I said in terms of determining

1 license fees, as components of ratings rather

2 than the rating itself.

3   Q   Okay.

4   A   And the patterns of viewing and

5 the demographics of viewing that are

6 incorporated in ratings. Overall, I think

7 certainly cable operators want the networks

8 that they carry to be financially viable and

9 do well. So ratings are one of the things --

10 since the more advertising they can sell, the

11 less they have to rely on license fees, you

12 know, that is actually -- that is something

13 that is I think in general important in the

14 industry, yes.

15   Q   The analysis you are talking about

16 of looking at components of ratings, how they

17 vary over time, how they vary between Versus,

18 the Golf Channel, and the NFL Network, that is

19 not something you have done in this case, is

20 it?

21   A   I haven't done exactly what you

22 asked, no.

1   MR. SCHMIDT: May I approach, Your

2 Honor?

3   JUDGE SIPPEL: You may.

4   BY MR. SCHMIDT:

5   Q   I would like to show you what has

6 been previously marked into an exhibit as

7 Enterprise's Exhibit 137.

8   JUDGE SIPPEL: It is already in?

9   MR. SCHMIDT: It is already in,

10 sir.

11   JUDGE SIPPEL: Enterprise 137.

12   MR. SCHMIDT: Yes, sir.

13   JUDGE SIPPEL: Thank you.

14   BY MR. SCHMIDT:

15   Q   Do you recognize this data, Mr.

16 Gerbrant?

17   (Pause.)

18   JUDGE SIPPEL: Well, what is it

19 entitled?   It looks like another list of

20 things.

21   MR. SCHMIDT: It is Table of

22 Ratings Data.